

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

DAVID LORENZA JOYNER, #1230707

VS.

THOMAS A. DAVIS, JR., ET AL.

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CIVIL ACTION NO. G-06-728

REPORT AND RECOMMENDATION

On December 4, 2006, Plaintiff, David Lorenza Joyner, filed a Motion to voluntarily dismiss all federal claims asserted by him against the Defendants in this cause. The Motion was prompted by the Defendants' removal of this action from State Court and Joyner's mistaken belief that his lawsuit will be dismissed pursuant to the "3-Strikes" Provision of 28 U.S.C. § 1915(g). Because the case was removed and, therefore, brought to Federal Court by the Defendants, not by Joyner, § 1915(g) does not apply to Joyner's claims in the United States District Court. However, if Joyner is unsuccessful in the prosecution of his federal claims any attempt to appeal would be barred by the language of § 1915(g) if Joyner sought to appeal *in forma pauperis*.

It is, therefore, the **RECOMMENDATION** of this Court that Joyner's Motion (Instrument no. 4) be **DENIED** and that the District Court consider only the merits of Joyner's federal claims and, if dismissed, remand any state law claims to preserve Joyner's appellate rights unless Joyner informs the Court in written objections to this Report and Recommendation that he still desires to dismiss all of his federal claims.

The Clerk **SHALL** send copies of this Report and Recommendation to the Parties, who **SHALL** have until **December 29, 2006**, in which to have written objections, filed pursuant

to 28 U.S.C. § 636(b)(1)(C), **physically on file** in the Office of the Clerk. The Objections SHALL be mailed to the Clerk's Office at P.O. Drawer 2300, Galveston, Texas 77553. **Any Objections filed SHALL be contained in a written document specifically entitled "Objections to the Report and Recommendation of the Magistrate Judge"**, which will then be forwarded to the District Judge for consideration. Failure to file written objections within the prescribed time **SHALL** bar the aggrieved party from attacking on appeal the factual findings and legal conclusions accepted by the District Judge, except upon grounds of plain error.

DONE at Galveston, Texas, this 11th day of December, 2006.



John R. Froeschner
United States Magistrate Judge